Supreme Court, U.S.
FILED
DEC 31 1997
CLERK

(2)

No. 97-919

In The
Supreme Court of the United States
October Term, 1997

LORRIE RHONEMUS AND VIDEO EXPRESS,
Petitioners,

vs.

STATE OF OHIO, ex rel. STEVEN H. ECKSTEIN,
Respondent.

On Petition For A Writ Of Certiorari
To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN H. ECKSTEIN
(Counsel of Record)
Prosecuting Attorney,
Fayette County, Ohio
214 W. Market St.
Washington Court House,
Ohio 43160-1316
(614) 335-0888
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7 pp

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

The respondent is satisfied with the petitioner's statement of the question.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of Ohio respectfully requests this court to deny the petition for a writ of certiorari seeking review of a denial of a petition for a writ of certiorari by the Supreme Court of Ohio of a decision of the Court of Appeals, Fayette County, Ohio, upholding a finding of nuisance for repeat violation of Ohio's pandering obscenity statute in the Common Pleas Court, Fayette County, Ohio.

STATEMENT OF THE CASE

On the instructions of the Fayette County, Ohio prosecuting attorney an investigator of that office rented two sexually explicit videotapes from the petitioner's inventory of over 300 sexually explicit titles available for rent. During the rental periods he made one copy of each tape for the purpose of using the copy as evidence. The copies were entered into evidence in a nuisance action brought against the Video Express by the prosecuting attorney alleging repeat violations of Ohio's pandering obscenity statute for its rental of the two videotapes. The trial court, after viewing the tapes, found them obscene under state statute and the Miller test and the Video Express was declared a nuisance.

REASONS WHY THE PETITION SHOULD BE DENIED

The petitioners contend their right to be free from unreasonable seizures under the First, Fourth and Fourteenth Amendments was violated when the investigator copied the rented videotape in order to use it as evidence in the nuisance action. They further contend the copied tapes should therefore be excluded from evidence in the nuisance action. If so excluded, the trial court's finding of nuisance would have to be reversed as there would then be no other evidence upon which to base its decision that

the tapes were obscene. The state relied upon the tapes themselves to establish the contemporary community standards under the Miller test. The respondent disagrees the petitioner's rights were violated, as there was no meaningful interference with any possessory interest of the petitioner, that is there was no seizure. Therefore the exclusionary rule does not apply and the trial court's finding of nuisance should stand.

Under Fourth Amendment law a seizure occurs when there is a meaningful interference with any possessory interest *of the petitioners* in such property. Absent one or both there cannot be a seizure. *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). This Court has also stated that absent some action taken by government agents that could properly be classified as a search or a seizure, the Fourth Amendment rules designed to safeguard First Amendment freedoms do not apply. (The Fourth Amendment rule referred to is the rule against prior restraints). Further, no case renders invalid under the First or Fourth Amendments the purchase of a few of a large number of magazines offered for sale. The risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches and seizures does not come into play in cases where the merchandise is purchased. *Maryland v. Macon*, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985). Therefore, unless there is a seizure there is no special protection afforded presumptively protected material.

The rule against prior restraint requires that three safeguards must be met before a prior restraint can be upheld. First, the burden of instituting judicial proceedings must be on the state. Second, any restraint prior to judicial review can be imposed only for a specified period and only for the purpose of preserving the status quo. Third and finally, a prompt judicial determination must be assured before a final restraint is placed on the dissemination of the material. *Southeastern Promotions, Ltd. v.*

Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). In this case had the prosecuting attorney decided not to institute proceedings there would have been no restraint whatsoever on the videotapes, the status quo would have been preserved, and there would have been no final restraint. An interesting twist!

Further, this Court has held that the Fourth Amendment proscription against unreasonable seizures must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or in respect to another kind of material. The question to be resolved is whether the seizure of a film without a warrant was unreasonable under Fourth Amendment standards and if so whether a film so seized is therefore inadmissible at trial. The seizure of contraband or stolen goods are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizures under Fourth and Fourthteenth Amendment standards. The common thread running through prior cases is to be found in the nature of the materials seized and the setting in which they were taken. In each case the material seized arguably fell within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Such a taking without a warrant is plainly a form of prior restraint and is, in those circumstances, unreasonable under the Fourth Amendment. It is unreasonable, not simply because it would have been easy to get a warrant, but rather because prior restraint of the right of expression, whether books or films, calls for a higher hurdle in the evaluation of reasonableness. *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973). Therefore, if there was a seizure herein by the copying of the videotapes it was reasonable as it did not bring to an abrupt halt an orderly and presumptively legitimate distribution or exhibition.

This is closely related to preserving the status quo, step two of the rule against prior restraints.

In the instant case, the Ohio appellate court reasoned that there was no violation of the petitioner's right to privacy herein, i.e., no search. The court further stated the critical issue was whether there was a meaningful interference with the petitioner's possessory interest in the property seized. *See* petitioner's petition at App. 3. The appellate court found from the evidence that the state did not violate any express terms of the rental agreement. This is contrary to the contention of the petitioner. *See* petition p. 13. The court further found there was no indication that Rhonemus held *any* copyright over the contents of the videotapes. The respondent argues that this applies most especially to the right as to the copying of materials since that was the right arguably interfered with Therefore, Rhonemus did not establish that any possessory interest she held was violated. Finally, the court found Rhonemus did not offer any other compelling explanation of how the state compromised her possessory interest in the videotapes. The appellate court concluded that the trial court did not err therefore in refusing to suppress the copied videotapes as evidence as there was no seizure.

CONCLUSION

A meaningful interference with a possessory interest in property means more than renting a videotape and copying it for use as evidence. This is so especially in light of the special protections afforded presumptively protected First Amendment material called the rule against prior restraint. This rule establishes whether a seizure of expressive material is reasonable. In it a taking by the state must not bring to an abrupt halt an orderly and presumptively legitimate distribution or exhibition of the presumptively protected material. There are no other

special protections. This prohibition places an added burden on law enforcement to ensure that expressive material remains in circulation until a final judicial determination as to its status as obscenity or not. Thus law enforcement officers must figure out ways to present expressive material to magistrates while not violating individual rights.

The petitioner herein objects to the copying of the videotape, not because of any prior restraint, and not because of any interference with any possessory interests but because law enforcement has figured out a way around the cumbersome and tricky method of presenting expressive material for judicial review without substantial effort. If upheld on appeal this method could substantially increase the efforts of law enforcement against hard-core pornography because of the ease of presenting the material. The respondent says that this is laudatory as the proliferation of hard-core pornography has been on the one hand due to the extra protections that many feel are highly specialized and full of pitfalls for the unwary officer. By denying this petition this Court will signal a new way to proceed in these cases.

Respectfully submitted,

STEVEN H. ECKSTEIN
(*Counsel of Record*)
Prosecuting Attorney,
Fayette County, Ohio
214 W. Market St.
Washington Court House,
Ohio 43160-1316
(614) 335-0888

Attorney for Respondent